Supreme Court, U. S.
FILED
MAR 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM 19____

NO. 79-1403

IRENE PEREZ,

Petitioner

VS

THE STATE OF TEXAS ~~AND RUBEN GARCIA, JUDGE OF THE 49TH DISTRICT COURT OF WEBB COUNTY, TEXAS,~~

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF THE
STATE OF TEXAS

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Laredo, Texas 78040
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INDEX

PAGE

LIST OF AUTHORITIES---------- i

OPINION BELOW---------- 1

JURISDICTION---------- 1

QUESTIONS PRESENTED---------- 2

APPLICABLE CONSTITUTIONAL PROVISIONS---------- 3

STATEMENT OF THE CASE--------- 3

SUMMARY OF ARGUMENT---------- 9

ARGUMENT AND AUTHORITIES------

I. PETITIONER WAS NOT ALLOWED TO CALL WITNESSES TO TESTIFY ON HER BEHALF IN VIOLATION OF COMPULSORY PROCESS CLAUSE OF THE SIXTH AMENDMENT---------- 10

II. PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE STATE CONVICTED HER OF FAILING TO PERFORM A DUTY WHICH THE LAW DID NOT REQUIRE HER TO PERFORM---------- 15

III. PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE STATE FAILED TO DISCLOSE DOCUMENTARY AND EXCULPATORY EVIDENCE---------16

IV. PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT INCREASED HER PUNISHMENT AFTER AN UNSUC-

INDEX (cont)

PAGE

CESSFUL APPEAL----------17

CONCLUSION----------18

CERTIFICATE OF SERVICE----------19

APPENDIX A
(Indictment)---------- 1

APPENDIX B
(Opinion)---------- 7

APPENDIX C
(Defendant's Bill of Exceptions)---------- 30
(Explanation of Bill of Exceptions by the Court)-- 34
(Exhibit A-subpoena duces tecum of John L. Hill)------ 35
(Exhibit B-subpoena duces tecum of Bob Bullock)------- 38
(Exhibit C-Motion to Quash Subpoena Duces Tecum)---------- 40
(Exhibit D-Motion to Quash Subpoena Duces Tecum------ ---------- 43
Exhibit E
(Defendant's Opposition to Motions to Quash of John Hill, Bob Bullock and Ron Hamilton)---------- 46
(Exhibit F-Affidavit in Support of Defendant's Opposition to Motion to Quash of John Hill and Bob Bullock)---------- 53

APPENDIX D
(Motion for Discovery of Documentary Evidence)------- 66

INDEX (cont)

PAGE

APPENDIX E
(Motion for Discovery of Exculpatory Evidence Material to the Defense of the Accused---76

APPENDIX F
(Motion for Leave to File Petition for Writ of Mandamus)-88

APPENDIX G
(Petition for Writ of Mandamus)90

***

LIST OF AUTHORITIES CITED

PAGE

Brady v Maryland, 373 US 83 (1963)----------16

Lambert v California, 355 U.S. 225 (1957)----------15

U. S. v Irvine, 98 US 14 (1879)----------16

Washington v Texas, 388 US 14 (1967)----------10

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Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

_____

OPINION BELOW

The opinion of the Court of Criminal Appeals for the State of Texas is reported at 590 SW2d 474. Said opinion appears at Appendix B, pages 7 thru 29.

JURISDICTION

The jurisdiction of this court is proper under Rule 19 of the Revised Rules of the Supreme Court of the United

States. The state court has decided federal questions in a way not in accord with applicable decisions of this court.

The Court of Criminal Appeals affirmed the judgment of the trial court on November 14, 1979. On December 19, 1979, the Court of Criminal Appeals denied Petitioner's Motion for Rehearing en Banc.

QUESTIONS PRESENTED

1. Whether petitioner was denied compulsory process of witnesses under the Sixth Amendment to the Constitution.
2. Whether it is a denial of due process of law under the Fifth and Fourteenth Amendments for the State to convict a person for failing to perform a duty which the law does not require that person to perform.
3. Whether petitioner was denied due process of law under the Fifth

and Fourteenth Amendments on the State's failure to disclose documents and other evidence favorable to her defense.

4. Whether the trial court can increase punishment after an unsuccessful appeal by the accused.

APPLICABLE CONSTITUTIONAL PROVISIONS

Fifth Amendment to the Constitution of the United States

Sixth Amendment to the Constitution of the United States

Fourteenth Amendment to the Constitution of the United States

STATEMENT OF THE CASE

The State of Texas collects a sales tax on the purchase and sale of motor vehicles. (S. F. 13). To collect the tax the State Highway Department sends blank tax receipts to the Tax Assessor-Collector of each county. (S. F. 25, 26). These tax receipts are consecutively numbered and consist of an original and four multi-colored copies. (S. F. 15, 17).

It is the legal as well as non-legal duty of the County Tax Assessor-Collector, not petitioner, to collect the sales tax and send the money to the State Comptroller. (S.F. 13,14,104,106,121).

Petitioner is a former employee of the Tax Assessor-Collector's Office in Webb County, Texas. (S.F.30,300). As part of her duties petitioner collected the tax money from the taxpayer and issued the original tax receipt to the taxpayer.(S.F.19-21, 30,103). Petitioner then turned over the other copies of the tax receipt and the tax money to other employees whose duties included the proper disposition of these items. (S.F. 319-321).

The tax money was ultimately deposited in the bank account of the Tax Assessor-Collector. (S.F. 91). The blue copy of the tax receipt was given to the taxpayer. (S.F. 23). The white copy went to the lienholder. (S.F.23). The pink copy was kept in

the office files of the Tax Assessor-Collector. (S.F. 22). The yellow copy was sent to the State Highway Department (S.F. 20). The Tax Assessor-Collector sent the green copy to the State Comptroller together with a check representing the amount of the tax. (S.F. 21, 118). This check was drawn on the account of the Tax Assessor-Collector. (S.F. 118). The only two people who were authorized to issue checks were the Tax Assessor-Collector and his chief deputy, Arturo Villarreal. (S.F. 119).

On August 23, 1976, an employee named Irma Perez issued a tax receipt to a person named Arthur E. Ochoa. (S.F. 282-283). This employee was operating under the supervision of petitioner. (S.F. 284). Ochoa issued a check to pay for the tax. (S.F. 243). This check was subsequently deposited in the bank account of the Tax Assessor-Collector. (S.F. 195). The blue copy

of the tax receipt was given to Ochoa. The yellow copy was sent to the State Highway Department. (S.F. 163). The Tax Assessor-Collector failed to send to the Comptroller the green copy of the Ochoa tax receipt as well as the tax money for such receipt. (S.F.47-48). Petitioner, rather than the Tax Assessor-Collector, was indicted and convicted for impairing, by withholding, the availability of the Arthur Ochoa tax receipt with the intent to harm the State of Texas. (R.449).

Prior to trial petitioner served subpoenas on Bob Bullock who is the State Comptroller,and John Hill, who was the State Attorney General at that time. (R. 842-862). The attorneys for the State filed motions to quash the subpoenas. (R. 717-725). The motions alleged that neither witness had personal knowledge of material facts. These matters were sworn to by an attorney for the State. The motions were not sworn to

by either Bullock or Hill. (R. 717-725). Neither Bullock nor Hill signed and filed any affidavits whatsoever. (R.717-725).

Petitioner attempted to file an affidavit showing why the testimony of these two witnesses was crucial to her defense but the trial court refused to allow the affidavit to be filed. (R. 842-862). After the trial, petitioner filed the affidavit by Bill of Exceptions (R. 842-862). Reference is made to Appendix C-30, which contains the Bill of Exception, the motions to quash at Appendix C-40 and C-43, and petitioner's opposition and affidavit at Appendix C-46 and C-53, respectively. The constitutional basis for Petitioner's position is found in the Opposition. (R. 853-855).

The trial court granted the motions to quash which had been signed and filed by an attorney for the State. (R.842). Petitioner was prohibited from calling

either Bullock or Hill to testify on her behalf. (R. 842).

Prior to trial petitioner filed detailed motions for discovery of documentary evidence and exculpatory evidence. (R. 641-649; 631-640). (See also Appendix D, pages 66 thru 75.) Although the trial court granted the motions, the State never complied with the court's orders. (R. 500, 640, 649, 501,795-797, 748-749, 631-637, 641-646). Petitioner was forced to go to trial without any of the items listed in her motions. The constitutional basis for the discoverv of exculpatory evidence was contained in Petitioner's Motion for Discovery of Exculpatory Evidence (R.636). Reference is made to Appendix E pages 76 thru 87 which contains the Motion for Discovery of Exculpatory Evidence.

After the case was affirmed on appeal, the appellate court issued its mandate to the trial court to carry out the terms of the original judgment.

Without any notice to petitioner, and after the appeal had been heard, the trial court issued a new order that petitioner make restitution to the State in an amount in excess of $200,000.00. Petitioner sought leave to file a Petition for Writ of Mandamus against the trial judge, but the court of Criminal Appeals denied the motion to file it. Reference is made to pages 88 thru 89 of Appendix F, and pages 90 thru 104 of Appendix G. (See Cause No. 8916,the certified record of which has been sent to this Honorable Court from the Texas Court of Criminal Appeals.)

SUMMARY OF ARGUMENT

Petitioner was denied compulsory process of witnesses when the court granted the State's motion to quash subpoenas of crucial witnesses for the defense. Based on the sworn statement of an attorney for the State,the trial court allowed the State to effectively choose the witnesses for the accused.

It is a denial of due process to convict a person for failing to perform

a duty which the person is not legally required to perform. Further, prior to trial petitioner was denied documents and exculpatory evidence material to her defense. Finally, to increase punishment after an unsuccessful appeal places a chilling effect on the decision of the accused to appeal the conviction.

ARGUMENT AND AUTHORITIES

I. Petitioner was not allowed to call witnesses to testify on her behalf in violation of compulsory process clause of the Sixth Amendment.

The compulsory process clause of the Sixth Amendment is applicable to the States through the Fourteenth Amendment. Washington v Texas, 388 US 14 (1967). In that case the court stated at pages 18-19:

"The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no

lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. This Court had occasion in In re Oliver, 333 US 257, 92 L ed 682, 68 S. Ct. 499 (1948), to describe what is regarded as the most basic ingredients of due process of law. It observed that:

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 US, at 273, 92 Led at 694 (footnote omitted).

***

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

The Court in Washington further stated at page 22:

"... the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in

a case, leaving the credit and weight of such testimony to be determined by the jury or by the court...." Rosen v United States, 245 US 467, 471, 62 Led 406, 409, 38 S. Ct. 148.

* * *

"We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."

The testimony of Bullock and Hill would have shown that someone other than the accused committed the offense. The testimony would have further shown that the tax receipt had not been withheld in view of the Comptroller's and Tax Assessor's knowledge of and access to the tax receipt. The testimony would have led to the discovery of the names of prior auditors in the county tax office. The testimony of these auditors would have shown that petitioner was not guilty of the offense.

This Honorable Court has long recognized that for the accused to summon witnesses on his own behalf is one of the most fundamental of American constitutional rights. To allow the prospective witness himself to decide whether he should be a witness would be bad enough. To allow the attorney for the accuser to decide whether the witnesses for the accused have personal knowledge of material facts makes a mockery of the

Sixth Amendment. The State is effectively allowed to decide which witnesses the accused will be allowed to call on her behalf. If the accused is not free to summon her own witnesses to establish her innocence, then she is not free to defend herself.

II. Petitioner was denied due process of law when the State convicted her of failing to perform a duty which the law did not require her to perform.

The legal and non-legal duty to send the green receipt to the State Comptroller belonged to the Tax Assessor-Collector rather than petitioner." Conduct which is wholly passive, unaccompanied by any activity or any circumstances to alert the Defendant to a duty to act, cannot constitutionally be punished where the petitioner did not know of the duty and there is no proof of probability of such knowledge.." Lambert v California, 355 US 225 (1957). Further, a person

cannot be convicted of withholding an item unless demand for the item is made and then she withholds it. See U.S. v Irvine, 98 US 450 (1879).

III. Petitioner was denied due process of law when the State failed to disclose documentary and exculpatory evidence.

The suppression by the prosecution of evidence favorable to and requested by an accused violates due process of law where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady v Maryland, 373 US 83 (1963).

In the present case petitioner requested detailed information showing that she had not committed any crimes and that someone else had committed the crime. Further, she requested information regarding prosecutorial grand jury misconduct which would have vitiated

the indictment under Texas law. The State refused to divulge any of the information requested.

IV. Petitioner was denied due process of law when the trial court increased her punishment after an unsuccessful appeal.

Where an original conviction has been set aside because of constitutional error, the imposition by the trial judge of a heavier sentence upon reconviction, as a penalty for choosing to exercise constitutional rights, is patently unconstitutional in violation of the due process clause of the Fourteenth Amendment. North Carolina v Pierce, 375 US 711 (1969). The same reasoning should apply in the case of a person whose appeal is unsuccessful and whose punishment is increased for having attempted to overturn the original judgment.

CONCLUSION

Petitioner was denied compulsory process of witnesses under the Sixth Amendment when the court quashed subpoenas for petitioner's witnesses based on the State's attorney's allegation that those witnesses were not material. Further, petitioner cannot constitutionally be convicted of failing to perform a duty which the law does not impose on her. Petitioner was denied due process of law when the State failed to disclose documentary and exculpatory evidence after being requested to do so by Petitioner and ordered to do so by the trial court. Finally, petitioner was denied due process of law when the trial court increased her punishment after an unsuccessful appeal.

WHEREFORE, Petitioner prays that this Honorable Court grant this Petition for Writ of Certiorari, that the conviction be overturned,and,

alternatively, that the case be remanded for new trial.

Respectfully submitted,

J. G. HORNBERGER
J. G. HORNBERGER,JR.
915 Victoria Street
Laredo, Texas 78040
Attorneys for Petitioner

by _____
J. G. Hornberger,Jr.

CERTIFICATE OF SERVICE

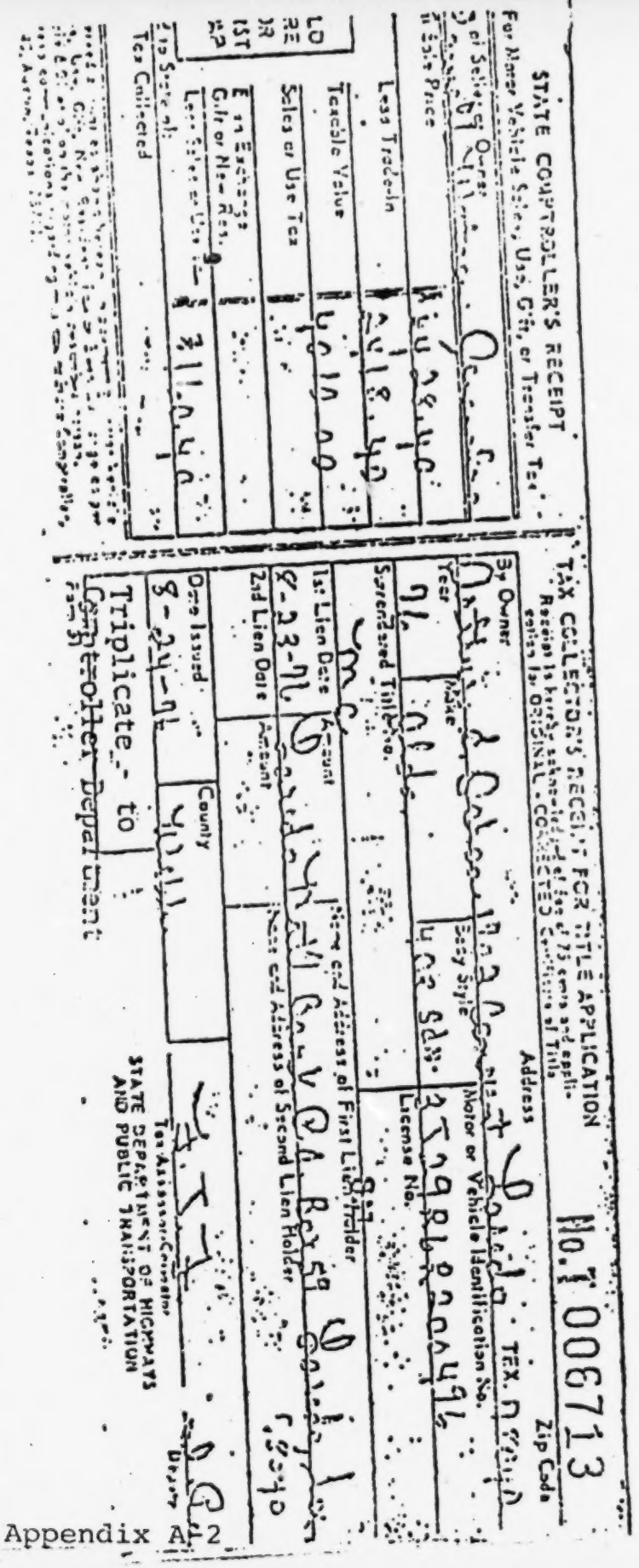
A copy of the above and foregoing Petition for Writ of Certiorari has this 10th day of March, 1980, been mailed to Mr. Charles R. Borchers, 703 S. Flores, Laredo, Texas 78040 and The Honorable Ruben Garcia, 49th District Court Judge, Webb County, Texas, P. O. Box 667, Laredo, Texas 78040.

J. G. Hornberger, Jr.

INDICTMENT

In the Name and by the Authority of the State of Texas:

The GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, at the March Term, 1977, of the 49th District Court of said County, upon their oaths present in and to said Court that on or about the 24th day of August, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid IRENE PEREZ did, then and there intentionally impair, by withholding the availability of a governmental record of the tenor following:


STATE COMPTROLLER'S RECEIPT

TAX COLLECTOR'S RECEIPT FOR TITLE APPLICATION

No. T 006713

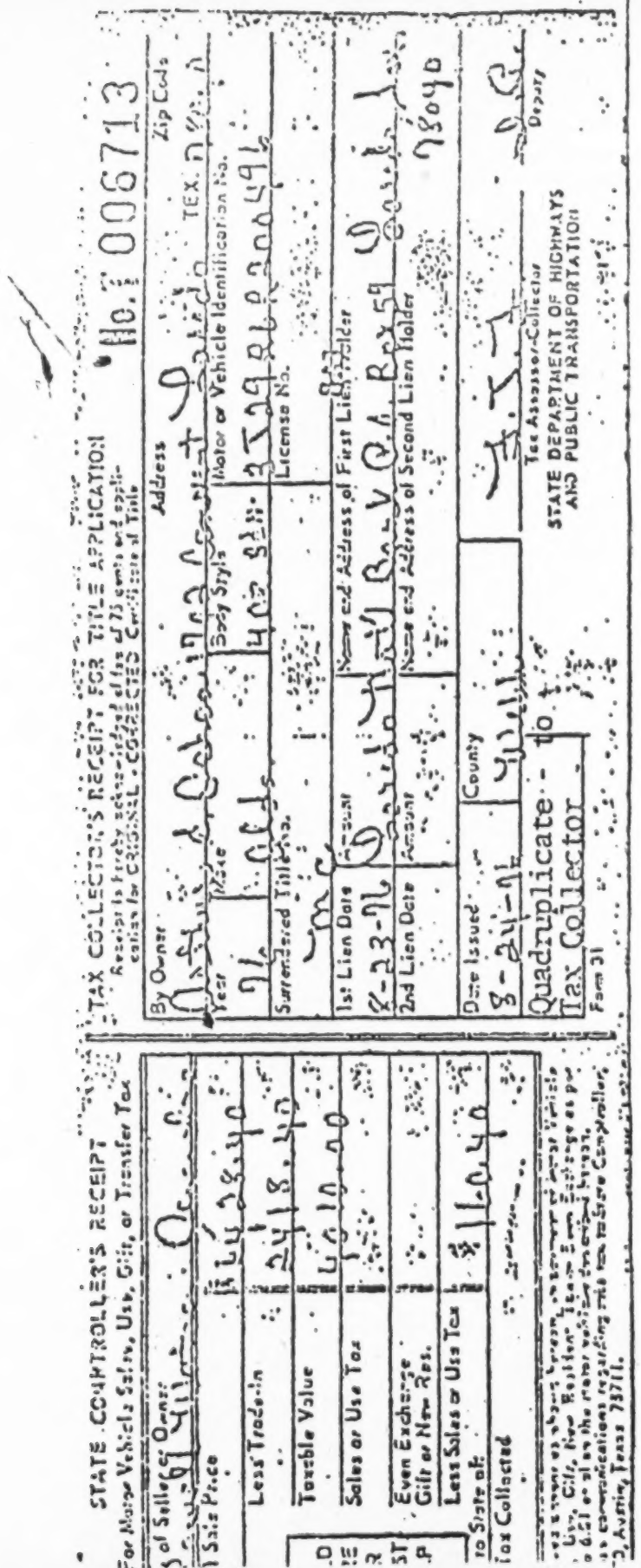
Appendix A-2

with the intent to harm another, namely, the County of Webb, State of Texas,

COUNT II

And THE GRAND JURORS upon their oaths aforesaid in said County and State, at said term, do further present in and to said Court that on or about the 24th day of August, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid, IRENE PEREZ, did then and there intentionally impair, by withholding, the availability of a governmental record of the tenor following:

Appendix A-3


STATE COMPTROLLER'S RECEIPT
TAX COLLECTOR'S RECEIPT FOR TITLE APPLICATION
No. 006713
Address
Zip Code
TEX.
Body Style
Motor or Vehicle Identification No.
License No.
By Owner
Year
Make
Surrendered Title No.
1st Lien Date
Amount
2nd Lien Date
Amount
County
Date Issued
Quadruplicate - Tax Collector
Form 31
STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION
Tax Assessor-Collector
Deputy
For Motor Vehicle Sales, Use, Gift, or Transfer Tax
Sale Price
Less Trade-in
Taxable Value
Sales or Use Tax
Even Exchange Gift or New Res.
Less Sales or Use Tax
To State of:
Tax Collected

Appendix A-4

with the intent to harm another, namely, the State of Texas,

/s/ Jose A. Gutierrez
Foreman of the Grand Jury

THE STATE OF TEXAS ()

County of Webb ()

I, Manuel Gutierrez, Clerk, of the 49th District Court of Webb County, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original Bill of Indictment, filed in said Court on the ___day of _____,A. D. 19___, in Cause No._____; Styled The State of Texas v _____.

Given under my hand and seal of said Court, at office in Laredo,Texas, this ___day of _____,A.D.,19 .

MANUEL GUTIERREZ, Clerk

by_____
Deputy

Name of Witnesses:

J.G.Hornberger,915 Victoria St.,Laredo, Texas.

Texas Ranger Ramiro Martinez,5909 Santa Maria, Apt. #21,

Appendix A-5

No. 11,868

THE STATE OF TEXAS
Vs.

IRENE PEREZ

INDICTMENT

OFFENSE

TAMPERING WITH
GOVERNMENTAL RECORDS
felony 3

Attorney.

TRUE BILL

Foreman of Grand Jury.

Presented in open Court by the Grand Jury, a quorum thereof being present, and filed the 29th day of March 19 77

MANUEL GUTIERREZ

Clerk 49th. District Court

By Manuel Gutierrez, Deputy

Amount of Bail, $ 20,000
Covers all indictments

Appendix A-6

IRENE PEREZ, APPELLANT

NO. 58,111 v --Appeal from Webb County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for tampering with governmental records. V.T.C.A. Penal Code, Section 37.10. Punishment was assessed at imprisonment for five years, probated, and a $5,000.00 fine.

Appellant challenges the sufficiency of the evidence to support the conviction and raises various complaints concerning the examining trial, the Grand Jury proceedings, the denial of pretrial motions, the exclusion of evidence at trial, and the court's charge to the jury. Appellant also complains of the court's denial of her motion for new trial and motion in arrest of judgment.

Appellant was convicted of impairing the availability of governmental records, namely automobile transfer tax receipts,

Appendix B-7

by withholding such receipts, with the intent to harm the State of Texas. See Section 37.10(a) and (c) of the Penal Code. Appellant contends she was entitled to a directed verdict of acquittal.

At the time of the offense appellant worked for the Webb County Tax Assessor-Collector's Office in Laredo, registering cars and collecting the 4 percent State sales tax that is levied on automobile transfers. Appellant's job was to collect the payment and issue receipts to the transferring parties, and at the end of the day to turn in the money collected and additional copies of the receipts to the cashier. One of the copies was retained by the Tax Assessor-Collector's Office, one was sent to the State Highway Department, and one was sent to the State Comptroller's Office. The receipts for the Comptroller's Office were filed in the County Office for one month, then were sent, along with 95 percent of the sales tax amount represented by the

the receipts, to the Comptroller's Office in Austin. Five percent of the tax was retained by Webb County. Appellant was convicted of withholding the Comptroller's copy of the receipt that had been issued to Arthur Ochoa on August 24, 1976.

Tom Gay testified that in January 1977, pursuant to his authority as a Field Auditor for the Comptroller's Office, he audited the Webb County Tax Assessor-Collector's office. As a result of the the audit Gay determined that some 2,395 Comptroller receipts of an estimated value of $250,000 had not been turned in to the Comptroller's Office as required. Gay could not locate the receipts in the Tax Assessor-Collector's Office. Gay asked appellant if she had any of the receipts, and appellant gave Gay 80-100 receipts worth approximately $3,900. Appellant told Gay that those receipts were all she had. Appellant's brother

wrote Gay a check for $3,900 to cover the amount represented by the receipts.

Upon deeper investigation further receipts turned up, including a batch of 590 receipts that appellant returned through her attorney. Ochoa's receipt was part of this batch. Only a small part of the money represented by the receipts was recovered by the State. Most of the receipts were identified as having been issued by or under authority of appellant by the presence of the initials "IP" on the face of the receipts. The Ochoa receipt was so initialed.

Appellant testified that shortages began appearing in the Tax Assessor-Collector's Office in 1969 or 1970. These shortgage took the form of appellant and others who worked at the windows not having enough money at the end of the day to cover the amount represented by the receipts. According to appellant the receipts could not be turned in unless

the payment equaled the amount of the receipts. When the money came out short, appellant would turn in only enough receipts to equal the money she had and would retain the rest of the receipts. This went on for a period of years. Appellant testified that she kept the receipts in envelope boxes at her desk and in a small closet next to her desk.

Appellant admitted that she withheld the Ochoa receipt on August 24, 1976, the day it was issued, and further admitted that she had not turned the receipt in by September 10, 1976, when that receipt and the others that had been issued in August were due at the Comptroller's Office in Austin. The evidence showed that, although she retained the Ochoa receipt, she turned in the check that had accompanied that receipt, presumably to cover other receipts. Appellant knew that these receipts were due in Austin

by September 10th. Appellant testified that on January 19, 1977, she delivered to Gay over 1,000 delinquent receipts. She delivered a check for over $10,000 along with these receipts. Later in the month she delivered the batch of receipts that included the Ochoa receipt.

Ron Hamilton, Regional Supervisor for the State Department of Highways and Public Transportation, testified that in May 1974 he conducted an audit of the Webb County Tax Assessor-Collector's Office and found that 24 receipts were missing, at an estimated value to the State of $13,248. He discussed the matter with appellant; she went home and returned with the receipts. She wrote out a personal check of over $3,000 to help cover the amount of the receipts.

Both Hamilton and Gay testified that receipts due from Webb County to

their respective offices were often months late. Gay also testified in rebuttal to appellant's testimony that when he conducted his audit he did not find any of the delinquent receipts, even though he looked in and around her desk and in the closet near her desk.

The evidence showed that it was one of appellant's duties to turn in the tax receipts at the end of the day. The evidence showed that appellant intentionally failed to turn in the Ochoa receipt until months after it was due, even though she turned in the payment that had accompanied that receipt. Clearly her action impaired the availability of that governmental record. Her intent to harm the State is evidenced by her continuing action of withholding thousands of dollars worth of similar receipts, her actions in paying for the receipts with checks written on her personal account, and upon being discovered,

her telling Gay that the 80-100 receipts she gave him were all the receipts she had. Gay's testimony that the receipts were not in the office also indicates that appellant either took the delinquent receipts she had in her possession from the office, or hid them somewhere in the office. Appellant knew that the receipts were to go to the Comptroller's Office each month. Appellant turned in over 1,500 delinquent receipts in three large batches when the audit uncovered that the receipts were missing. Appellant's behavior is simply not consistent with innocent or unintentional action. We find the evidence sufficient to sustain the conviction; a directed verdict of acquittal was not in order.

In a series of related grounds of error appellant complains of the court's refusal to require that the Grand Jury proceedings be recorded, its refusal to permit her to inspect the minutes of the Grand Jury, and its refusal to pierce

the secrecy of the Grand Jury and set aside the indictment on the ground that the District Attorney was present during the Grand Jury's deliberations.

As appellant concedes, there is no requirement, statutory or otherwise, that Grand Jury testimony be recorded and transcribed. See Tibbetts v State, 494 S.W.2d 552 (Tex. Crim. App. 1973); Acuff v State, 433 S.W.2d 902 (Tex. Crim. App. 1968). In its order denying appellant's motion to inspect the minutes of the Grand Jury, the court notes that as was the custom in the 49th District Court, no minutes were taken or recorded. The District Attorney also testified at a pretrial conference that no minutes were taken. Moreover, appellant did not make a showing of a particularized need for the minutes of the Grand Jury. Tibbetts v State, supra; Terry v State, 489 S.W.2d 879 (Tex. Crim. App.1973).

Appellant also filed a motion to pierce the secrecy of the Grand Jury proceedings and a motion to set aside the indictment, alleging that the District Attorney had been present during the Grand Jury's deliberations. Both motions were denied. Appellant filed no affidavits that supported these allegations, and her motions are mainly based on speculation and beliefs of defense counsel as to what might have been going on in the Grand Jury room. Appellant presented no evidence to support the allegations. The court properly denied these motions. See Tibbetts v State, supra; Terry v State, supra. Appellant's contentions regarding the Grand Jury proceedings are overruled.

Appellant contends that the indictment should be set aside because she was denied the right to call witnesses at the examining trial. At the examining trial the State presented the testimony of Texas

Ranger Ramiro Martinez. The court rules Martinez's testimony sufficient to establish probable cause to bind appellant over to the Grand Jury. Appellant then called Cruz Cabello and Francisco Flores, the Webb County Tax Assessor and Collector, to testify. Neither witness testified to any matter that put the previous determination of probable cause into question. When it became apparent that appellant's witnesses had nothing material to offer, the court cut off Flores's testimony. Appellant objected to that action and to the court's refusal to call further witnesses to enable her to attack the existence of probable cause. The court did not err because sufficient evidence to justify holding appellant under bond had already been presented by the State and appellant's witnesses were offering nothing to rebut such probable cause. Moreover, the refusal to allow appellant to call further witnesses at the examining trial

provides no basis to set aside the indictment. As this Court has previously noted, the return of a true bill of indictment independently satisfies the principal purpose and justification of the examining trial--to show that there is probable cause to believe the accused committed the offense charged. See Brown v State, 475 S.W.2d 938 (Tex. Crim. App. 1971); Harris v State, 457 S.W.2d 903 (Tex. Crim. App. 1970). No error is shown.

Appellant contends that the indictment should have been set aside because the trial court did not have jurisdiction over the cause at the time the indictment issued. Two days after the examining trial appellant filed a petition for a writ of mandamus in the 111th District Court of Webb County, requesting that the judge who had presided at the examining trial be ordered to hold another examining trial. The 111th District Court, traditionally a civil court, refused to take jurisdiction. Appellant then applied to

the same court for a temporary injunction against the Webb County District Attorney enjoining him from taking appellant's case before the Grand Jury prior to appellant's receiving another examining trial. Again the 111th District Court refused to take jurisdiction. Appellant then filed a petition for a temporary injunction in the Court of Civil Appeals in San Antonio. Her petition was denied. The courts to which appellant applied for relief never took jurisdiction of the matter; the trial court was never deprived of jurisdiction nor was the State prohibited from properly pursuing an indictment. Appellant's contenton is without merit.

Appellant contends that the court improperly denied her motion for discovery of exculpatory evidence and motion to compel the District Attorney to comply with the court's discovery order. Appellant filed numerous motions relating to discovery of various items, and on

appeal she does not specify which action of the court she considers erroneous. The record reflects that the trial court granted appellant's motions for discovery of exculpatory and documentary evidence and ordered the District Attorney to supply appellant with all exculpatory and documentary evidence material to appellant's prosecution. Appellant does not specify what material, if any, was withheld or to which she was denied access; nor does appellant allege or show any harm. Appellant nowhere shows that the unspecified matter of which she complains was material to her defense or that such matter was in the possession of the State. See Bell v State, 442 S.W.2d 716 (Tex. Crim. App. 1969). This ground of error is without merit.

Appellant next contends that the court erred when it quashed the subpoenas duces tecum of then Attorney General John Hill and State Comptroller Bob Bullock.

Both officials filed affidavits stating that they did not have personal knowledge of facts material to the case. Both acknowledged in the affidavits that they had possession of certain documents demanded in the subpoenas and stated that they would make those documents available to the defense. Upon demand by the court at the hearing on the motions to quash, appellant was unable to show what Hill and Bullock would testify to that would be material to her defense. See Jones v State, 501 S.W.2d 677 (Tex. Crim. App. 1973); Spencer v State, 503 S.W.2d 557 (Tex. Crim. App. 1974). The affidavit that accompanied appellant's motion to quash does not show that Hill or Bullock knew anything that was material to appellant's defense, nor does appellant allege anything in her belief on appeal to show that the two men would have been material witnesses. The court did not err in refusing to require Hill and Bullock to

personally appear as witnesses at appellant's trial.

Appellant called Ron Hamilton as a defense witness. On cross-examination of Hamilton the State elicited testimony harmful to the defense. Appellant's counsel then attempted to impeach Hamilton, claiming he had become a hostile witness. The court refused to allow appellant to impeach Hamilton. Appellant contends this was error. Appellant never laid a predicate for impeaching Hamilton--she did not claim surprise, and she did not demonstrate surprise by showing outside the presence of the jury that the witness had made prior statements inconsistent with his trial testimony. See Brown v State, 523 S.W.2d 238 (Tex. Crim. App. 1975); Banks v State,510 S.W.2d 592 (Tex. Crim. App. 1974). Absent such a predicate, appellant was not entitled to impeach Hamilton. This contention is overruled.

Appellant offered into evidence an indictment pending against her in a related cause, in a further effort to impeach Hamilton's testimony. As pointed out above, appellant did not establish a predicate for impeaching Hamilton. Moreover, the indictment had extremely limited probative value, if any at all, when offered for purposes of impeachment. The court properly excluded the indictment from evidence.

Appellant complains of the court's refusal to allow her to elicit from Gay that Francisco Flores and Arturo Villarreal, the supervisor of the Tax Assessor-Collector's Office, told Gay during his audit that they had known about the receipt shortgages for several years. Appellant urges that such statements were admissible as declarations against penal interest on the part of Flores and Villarreal. These statements were contrary

to Flores and Villarreal's penal interest in that they tended to make the two men parties to the offense in this case. It is well established, however, that declarations of a third party admitting guilt of the offense for which the Defendant is on trial are admissible only when, among other things, the guilt of the third party is inconsistent with the defendant's guilt. Ramirez v State, 543 S.W.2d 631 (Tex. Crim. App. 1976); Cameron v State, 217 S.W.2d 23 (Tex. Crim. App. 1949). Such is not the case here. This contention is overruled.

Appellant urges that the court erred when it instructed the jury that evidence of extraneous offenses consisting of appellant's withholding tax receipts other than the Ochoa receipt were to be considered only for the purpose of showing appellant's system,intent, and design. It is appellant's position that the charge should have limited the

jury's consideration solely to appellant's intent. We disagree. The extraneous offenses also tended to show a continuous course of action by appellant,amounting to system and design on her part. Extraneous offenses are admissible to show system and design as well as intent. See Albrecht v State, 486 SW2d 97 (Tex. Crim. App. 1972). No error is shown.

Appellant complains of the exclusion from evidence of the monthly reports that went to the Comptroller's Office in the years 1973, 1974, and 1975; she also complains of the exclusion of the subpoena issued for Alan Beeson, the State Auditor for Webb County. The gist of appellant's complaint in both grounds is that those documents show that county and State officials knew receipts were being withheld at the Webb County Tax Assessor-Collector's Office. The alleged knowledge of county and State officials that receipts were being withheld does not tend

to prove appellant's innocence and is not relevant to any other issue at trial. Any probative value would have been outweighed by the confusion the evidence would have caused the jury. The court did not abuse its discretion in ruling this evidence inadmissible. See Albrecht v State, supra; Hernandez v State, 484 SW2d 754 (Tex. Crim. App. 1972).

Appellant complains of the court's refusal to instruct the jury on the law of circumstantial evidence. Appellant's own testimony showed that she withheld the Ochoa receipt. When a defendant admits committing the act and only intent is at issue, no charge on circumstantial evidence is required. Baldwin v State, 538 S.W.2d 109 (Tex. Crim. App. 1976). Appellant complains of the court's refusal of various other of her requested instructions. Our review of the record shows that the requested instructions

were covered by the main charge, see Bridges v State, 422 S.W.2d 449 (Tex. Crim. App.1967), or constituted misstatements of the law or comments on the weight of the evidence. No error is shown.

Appellant filed a motion for new trial in which she alleged that the State fraudulently prevented certain witnesses from attending the trial. She complains of the court's denial of her motion. The record does not reflect that a hearing on appellant's motion for new trial was held. Appellant attached no affidavits to support her motion for new trial. In the absence of any evidence to support the allegations, the court did not err in denying appellant's motion for new trial. Pinson v State, 530 SW2d 946 (Tex.Crim.App.1975); Rios v State, 510 S.W.326 (Tex. Crim. App. 1974). Moreover,appellant filed no motion for continuance to obtain more time to secure the presence of the wit-

nesses. See Robinson v State, 453 S.W. 2d 836 (Tex. Crim. App. 1970); Young v State, 374 S.W.2d 891 (Tex.Crim. App. 1964). No error is shown.

Finally, appellant contends that the court should have granted her motion in arrest of judgment. Appellant alleges that the indictment was vague and indefinite in that it failed to allege from whom the Ochoa receipt was withheld. The motion was timely filed. The indictment alleged that appellant "intentionally impair(ed), by withholding, the availability of a governmental record of the tenor following: (a photostatic copy of the Ochoa receipt is then attached) with intent to harm another, namely, the State of Texas." In order to state the offense it was necessary to allege from whom the receipt was withheld. In any event the receipt on its face shows that it is to be sent to the Comptroller's Office; that constitutes sufficient notice

that the receipt was witheld from the Comptroller's Office. We note that no motion to quash the indictment was filed; if appellant did not have sufficient notice of what she was charged with, she should have filed such a motion rather than waiting until the trial was completed and then filing a motion in arrest of judgment. Error, if any, is waived. See Reed v State, 373 S.W.2d 687 (Tex. Crim. App.1963); Benson v State, 247 S.W.510 (Tex.Crim. App.1923).

The judgment is affirmed.

PHILLIPS,JUDGE

(Delivered Novemer 14,1979)

Panel No.3,4th Quarter
1979 composed of Truman
Roberts, Judge
W. T. Phillips, Judge
Carl E. F. Dally, Judge

No. 16,868

THE STATE OF TEXAS ()IN THE DISTRICT COURT
VS ()49TH JUDICIAL DISTRICT
IRENE PEREZ ()WEBB COUNTY,TEXAS

DEFENDANT'S BILL OF EXCEPTIONS

BE IT REMEMBERED that upon the trial of the above styled numbered cause the Defendant, Irene Perez, filed subpoenas duces tecum to the Honorable John L.Hill, Attorney General of Texas, and to Bob Bullock, Comptroller of the State of Texas. Copies of such subpoenas are attached hereto, incorporated herein, made a part hereof for all purposes, and are marked Exhibits "A" and "B",respectively. That the said Bob Bullock and the said John L. Hill each filed a Motion to Quash Subpoena Duces Tecum. Copies of such Motions are attached hereto,incorporated herein, made a part hereof for all purposes, and are marked Exhibits "C" and "D", respectively. That thereupon the said defendant, Irene Perez, filed her answer in opposition to the Motions to Quash of John Hill and Bob

Bullock, and a copy of such Answer is attached hereto, incorporated herein, made a part hereof for all purposes, and is marked Exhibit "E". That the said Defendant attempted to file, along with her answer in opposition, her affidavit which sets forth in detail why the evidence subpoenaed was necessary in her defense, and a copy of such affidavit in support of defendant's opposition to motion to quash of John Hill and Bob Bullock, together with the Clerk's notation thereon is attached hereto,incoperated herein, made a part hereof for all purposes, and is marked Exhibit "F".

That the Trial Judge,the Honorable E.James Kazen,summarily refused to permit the filing of said affidavit, and,therefore, there is nothing in the record to show the materiality of the evidence subpoenaed. That the Trial Court then granted the Motions to Quash of the prospective witnesses, John L. Hill and Bob Bullock,and

the said witnesses did not testify.

That the defendant was found guilty by the jury and was assessed a punishment of five (5) years in the penitentiary, which was probated, and a $5,000 fine.

That even though the Defendant took the witness stand and testified in her own behalf, there was no other persons competent to testify to the matters that John L. Hill and Bob Bullock could have testified to and the Defendant states that such testimony was material to her defense and that such testimony in all probability would have exonerated her.

That an employee of the Comptroller's office has since testified that the alleged shortage in his opinion took place over a period of ten (10) years, but he did not give testimony on the trial of the above case.

That the Defendant knows of no

reason why the Court did exclude or should have excluded from this record the said affidavit attached hereto as Exhibit "F".

To which action of the Court in excluding from the record this said affidavit the defendant then and there excepted and herenow tenders her Bill of Exception No. 1 and asks that the same be approved, allowed, signed by the Court and filed as a part of the record in this case.

J.G.HORNBERGER
J. G. HORNBERGER,JR.
915 Victoria St.
Laredo, Texas 78040
Attorneys for Defendant

by /s/J.G.Hornberger

The foregoing Bill of Exception No. 1, having been reduced to writing by counsel for defendant, and,and having been presented to the undersigned Presiding Judge of said Court for allowance and signature within ninety days from date that Notice of Appeal was given,and

within the time prescribed by law,and having been by me submitted to counsel for the State of Texas and found by him to be correct,and having been by me found to be correct,it is hereby allowed, approved and ordered filed by the Clerk of this Court as a part of the record in this case.

Dated this 12th day of December,1977.

/s/E.James Kazen
E.James Kazen,Judge of the 49th District Court of Webb County,Texas.

EXPLANATION OF BILL OF EXCEPTIONS BY THE COURT

In connection with the foregoing Bill of Exceptions, there was a statement made by the District Attorney in open Court that any information sought by the Defendants in their subpoena duces tecum could be furnished by witnesses in the offices of Attorney General John Hill and Comptroller Bob Bullock who actually worked on the case, and were familiar with the facts and evidence sought to be ellicited by the subpoena

duces tecum. It was stated in open Court that Attorney General John Hill and Comptroller Bob Bullock have no personal knowledge of the facts,and that as heads of their respective departments, knew only what the personnel working under them, and who had actually investigated the cases and who had been subpoenaed to testify in the case, knew about the case and had reported to the head of the office. There was also a statement by the District Attorney that neither the Attorney General nor the Comptroller personally participated in the investigation of this case.

/s/E.James Kazen
E.James Kazen,49th District Judge

EXHIBIT "A"

Subpoena duces tecum

You are Commanded to Summon The Honoraable John L. Hill, Attorney General of Texas, Austin, Texas to be

and appear before the 49th District Court of Webb County,to be held at 9:30 a.m.,in said County,on the 25th day of July 1977,then and there to testify as a witness in behalf of the defendant in a criminal action pending in said Court, entitled and numbered on the Criminal Docket of said court,The State of Texas v Irene Perez No. 16868,and that he bring with him and produce in said Court,at said time and place certain records,documents and reports desired as evidence in said criminal action,to-wit: To bring with him and produce (1)all correspondence between the Comptroller's Office and the Governor, Texas Highway Dept.,Texas Ranger,Webb County District Attorney and any other person,which correspondence deals with the missing monies at the Webb County Tax Office,and especially a letter from Bob Bullock, State Comptroller to the Governor of Texas dated January 18, 1977,(2) all monthly reports from Webb County covering Motor Vehicle

Transfer Receipts for the past 10 years and all papers relating to the alleged shortage of money in the Webb County Tax Assessor's Office,(3)all penalty tax receipts for the past 10 years(4)all mexican permits from Webb County for the past 10 years(5)all 72 hour permits from Webb County for the past 10 years,(6)all one trip tickets receipts from Webb County for the past 10 years,(7)all applications for title from Webb County for the past 10 years(8) all transfer receipts from Webb County for the past 10 years, (9)all motor vehicle sales tax receipts from Webb County for the past 10 years, (10)all vehicle registration receipts from Webb County for the past 10 years, (11)inventory lists prepared for missing plates from the Webb County Tax Assessor's Office for the past 10 years,(12)all daily reports prepared by the Webb County Tax Assessor's Office for the past 10 years.

Herein fail not, but of this Writ make due return,showing how you have ex-

ecuted the same.

Witness my official signature at Laredo, Texas on this the 12th day of July, 1977,

/s/Manuel Gutierrez
Manuel Gutierrez,Clerk
49th District Court,Webb County,Texas
by_____Deputy

EXHIBIT "B"

Subpoena Duces Tecum

You are commanded to summon BOB BULLOCK Comptroller of the State of Texas, to be and appear before the 49th District Court of Webb County, to be held at 9:30 A.M. in said County, on the 25th day of July, 1977,then and there to testify as a witness in behalf of the defendant in a criminal action pending in said Court,entitled and numbered on the Criminal Docket of said Court,The State of Texas v IRENE PEREZ,No.16868,and that he bring with him and produce in said Court, at said time and place certain records,documents and reports desired as evidence in said criminal action,to-wit: To bring with him

and produce (1)All correspondence between the Comptroller's Office and the Governor, Texas Highway Dept.,Texas Rangers,Attorney General's Office,Webb County District Attorney and any other person,which correspondence deals with the missing monies at the Webb County Tax Office,and especially a letter from you, as Comptroller of the State of Texas to the Governor of Texas dated January 18, 1977. (2)All monthly reports from Webb County covering Motor Vehicle Transfer Receipts for the past 10 years and all papers relating to the alleged shortages of money in the Webb County Tax Assessor's Office (3)All penalty Tax receipts for the past 10 years,(4)All mexican permits from Webb County for the past 10 years,(5)all 72 hour permits from Webb County for the past 10 years,(6)all one-trip tickets receipts from Webb County for the past 10 years,(7)all applications for title from Webb County for the past 10 years, (8)all transfer receipts from Webb County

for the past 10 years, (9) all motor vehicle sales tax receipts from Webb County for the past 10 years and(10)all vehicle registration receipts from Webb County for the past 10 years,(11)all inventory lists prepared for missing plates from the Webb County Tax Assessor's Office for the past 10 years,(12)all daily reports prepared by the Webb County Tax Assessor's Office for the past 10 years. HEREIN FAIL NOT, but of this Writ make due return,showing how you have executed the same.

WITNESS my official signature,at Laredo, Texas this 12th day of July,1977.

/s/Manuel Gutierrez
Manuel Gutierrez,Clerk
49th District Court,Webb County
by_____deputy

EXHIBIT "C"

(caption omitted)

MOTION TO QUASH SUBPOENA DUCES TECUM

TO THE HONORABLE THE SAID COURT:

Now comes BOB BULLOCK, hereinafter called movant, and respectfully moves the Court to quash the subpoena duces tecum heretofore issued for his appearance as a witness for the defendant in the above styled and numbered cause, for the following good and sufficient reasons:

I

Movant is the duly elected Comptroller of Public Accounts of the State of Texas and is the legal custodian of the official government records enumerated as items (1),(2),and (9)in said subpoena duces tecum, and movant is willing to send his designated representative to appear and produce official records in his custody in response to a reasonable and specific request for such records.

II

Movant is not a witness to any material fact and has no personal knowledge of any facts relevant or material to the above-styled and numbered cause; therefore,

any attempt on the part of the defendant to subpoena the movant is unreasonable and oppressive.

III

Said subpoena duces tecum, a copy of which is attached hereto as Exhibit "A", is vague, overbroad and indefinite and constitutes "a prying and fishing expedition that cannot be authorized by law". Ex parte Gould,132 S.W.364 (Tex.Crim.App.1910); Donald v State, 453 S.W.2d (Tex.Crim.App.1969).

WHEREFORE, PREMISES CONSIDERED, movant prays the Court, after hearing hereon, to grant this motion and enter its order quashing the said subpoena duces tecum issued for movant.

Respectfully submitted,
JOHN L. HILL
ATTORNEY GENERAL OF TEXAS

/s/David M. Kendall
David M. Kendall
First Assistant Attorney General
Attorney for Bob Bullock
P. O. Box 12548,Capitol Station
Austin, Texas 78711

STATE OF TEXAS ()
COUNTY OF WEBB ()

BEFORE ME, the undersigned authority, on this day personally appeared David M. Kendall, who,being by me duly sworn,upon oath states that he is the attorney for Bob Bullock, that he has read the foregoing Motion and that the facts and allegations therein contained are true and correct.

/s/DAVID M. KENDALL
David M. Kendall

Subscribed and sworn to before me on this 18th day of July,1977,to certify which witness my hand and seal of office.

/s/Betty J. Meyer
Notary Public in and for Travis County, Texas

(Exhibit A attached to Exhibit C omitted)

EXHIBIT "D"

(caption omitted)

MOTION TO QUASH SUBPOENA DUCES TECUM

TO THE HONORABLE THE SAID COURT:

NOW COMES John L. Hill, hereinafter called movant, and respectfully moves the

Court to quash the subpoena duces tecum heretofore issued for his appearance as a witness for the defendant in the above styled and numbered cause, for the following good and sufficient reasons:

I

Movant is the duly elected Attorney General of the State of Texas and is not the legal custodian of any of the official government records subpoenaed by the Defendant herein, with the exception of a copy of the letter from the Comptroller to the Governor dated January 18,1977, which letter movant hereby agrees to make available to the defendant.

II

Movant is not a witness to any material fact and has no knowledge, either in his personal or official capacity, of any facts relevant or material to the above-styled and numbered cause; therefore, any attempts on the part of the defendant to subpoena the movant as a witness is un-

reasonable and oppressive.

III

Said subpoena duces tecum, a copy of which is attached hereto as Exhibit A, is vague, overbroad and indefinite and constitutes "a prying and fishing expedition that cannot be authorized by law." Ex Parte Gould, 132 SW 364 (Tex. Crim.App.1910); Donald v State, 453 SW2d 825 (Tex. Crim. App. 1969).

WHEREFORE, PREMISES CONSIDERED, movant prays the Court after hearing hereon, to grant this motion and enter its order quashing the said subpoena duces tecum issued for movant.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

/s/David M. Kendall
David M. Kendall
First Assistant Attorney General

Attorney for John L. Hill
P. O. Box 12548, Capitol Station
Austin, Texas 78711

STATE OF TEXAS ()

COUNTY OF WEBB ()

BEFORE ME, the undersigned authority on this day personally appeared David M. Kendall, who, being by me duly sworn, upon oath states that he is the attorney for John L. Hill, that he has read the foregoing Motion and that the facts and allegations therein contained are true and correct.

/s/ David Kendall
David M. Kendall

Subscribed and sworn to before me on this the 18th day of July,1977,to certify which witness my hand and seal of office.

/s/ Betty J. Meyer
Notary Public in and for Travis County, Texas.

(Exhibit A,attached to Exhibit D omitted)

EXHIBIT "E"
(caption omitted)

DEFENDANT's OPPOSITION TO MOTIONS TO QUASH OF John Hill, Bob Bullock and Ron Hamilton

TO THE HONORABLE THE SAID COURT:

Comes now the Defendant Irene Perez, and respectfully moves the Court to deny the motions to quash of John Hill Bob Bullock, and Ron Hamilton and in support would show the following:

1. The Sixth Amendment to the United States Constitution and Article 1, Section 10 of the Texas Constitution guarantee the Defendant the right to compulsory process of witnesses. The issuance of such process is not a matter of judicial discretion in Texas. Ross v State,504 SW2d 862 (Cr.App.1974); Bedford v State, 283 SW2d 224 (1922). The right to compulsory process is so fundamental and essential to a fair trial that it is incorporated in the due process clause of the Fourteenth Amendment. Washington vTexas, 388 US 14 (1967).

2. Notwithstanding the above, Defendant calls the Court's attention to significant absence of affidavits from John Hill, Bob Bullock and Ron Hamilton. The affidavit of a lawyer who is not

familiar with the intricacies of the case and who is not responsible for the preparation of the case is meaningless. Moreover, such statements do not outweigh the defense counsel's statement of materiality in the application for the subpoenas. Certainly the lawyer who is presenting the defense would be more knowledgeable with what is material to the defense than a prosecuting attorney who is not even familiar with the case.

3. Defendant appreciates the offers of movants to select witnesses for the Defendant, but Defendant would rather rely upon her Constitutional right to present the witnesses of her own choosing.

4. For the Attorney General of the State of Texas to suggest such a flagrant violation of the most basic of constitutional rights is contrary to the interests of the Defendant, the interests of justice, and the interests of the State.

5. The subpoena duces tecum meets the requirements of specificity. Such subpoena should give a reasonably accurate description of the papers wanted,either by date, title, substance, or the subject to which they relate. Ex Parte Gould, 132 SW 364 (Tex.Cr. App.1911). The subpoena duces tecum issued by the Defendant meets these criteria. Each of the documents taken together will enable the jury and the Court to see that the Defendant did not withhold the Arthur Ochoa tax receipt, that she did not intend to harm the State or the County,and that someone else committed the offense rather than the Defendant.

6. Defendant opposes the motion and urges that it be summarily denied on the following grounds:

a. Compulsory Process Clause of the Sixth Amendment to the U.S.Constitution and Article 1, Section 10 of the Texas Constitution in that Defendant would be denied the right to call movants to

establish her innocence.

b. Due Process Clause of the Fifth and Fourteenth Amendment to the U.S. Constitution and Article 1,Section 10 of the Texas Constitution.

c. Confrontation and Cross-Examination Clause of the Sixth Amendment to the U. S. Constitution and Article 1, Section 10 of the Texas Constitution in that the Defendant is being denied the right to confront and cross-examine the movants.

d. Effective counsel under the Sixth Amendment and Article 1, Section 10 of the Texas Constitution in that defense counsel cannot adequately present the defendant's defense or cross examine the States' witnesses without the testimony of John Hill and Bob Bullock and Ron Hamilton.

WHEREFORE, Defendant prays that such motion be summarily denied.

However, if the Court declines to summarily deny such motion, and instead requires the Defendant to show the relevancy and materiality of the testimony of the witnesses, she will do so. But the Defendant will object to doing so on the following grounds:

1. Compulsory Process under the Sixth Amendment to the U.S. Constitution and Article 1, Section 10 of the Texas Constitution in that conditions are being attached to an unrestricted right.

2. Self-incrimination clause of the Fifth Amendment to the U. S. Constitution and Article 1, Section 10 of the Texas Constitution, and Articles 38.21 and 38.22 of the Texas Code of Criminal Procedure in that the Defendant is required to give a sworn statement to show the materiality of the witnesses' testimony.

3. Due Process Clause of the Fifth and Fourteenth Amendments to the U.S.Constition and Article 1, Section 10 of the Texas Constitution in that the Defendant is being required to disclose its strategies, work product,and theories to the

State prior to the time of trial.

4. Confrontation and Cross-Examination as stated above.

5. Effective Counsel as stated above.

Respectfully submitted,

J. G. HORNBERGER
J. G. HORNBERGER, JR.
915 Victoria Street
Laredo, Texas 78040
Attorneys for Defendant

by /s/J.G.Hornberger,Jr.
J. G. Hornberger,Jr.

STATE OF TEXAS ()
COUNTY OF WEBB ()

BEFORE ME, the undersigned authority,on this day personally appeared Irene Perez, who after being duly sworn states that she is the defendant in the above entitled and numbered cause,and she has read the above and foregoing Opposition to Motions to Quash of John Hill, Bob Bullock and Ron Hamilton and the matters of fact contained therein are true.

/s/Irene Perez
Irene Perez

Sworn to and subscribed before me by the

said Irene Perez on the 21st day of July, 1977,to certify which witness my hand and seal of office.

/s/Rosa S. J. Mata
Notary Public in and for Webb County,Texas

EXHIBIT "F"

Received in Court 7/20/77 from

J. G. Hornberger, Jr.

Not filed on orders of Judge Kazen

7/21/77

7/25/77-On order of Judge Kazen file only as a part of a Bill of Exception

--not in the case--

(caption omitted)

AFFIDAVIT IN SUPPORT OF DEFENDANT'S OPPOSITION TO MOTION TO QUASH OF JOHN HILL AND BOB BULLOCK

THE STATE OF TEXAS ()

COUNTY OF WEBB ()

IRENE PEREZ, being duly sworn, deposes and says:

"My name is Irene Perez. I am the Defendant in this case. I am a former

deputy of the Webb County Tax Assessor-Collector's Office, having worked in that office for over 15 years. My employment with the Webb County Tax Assessor-Collector's Office was terminated by Francisco Flores, the Webb County Tax Assessor Collector, as a result of the accusations made against me.

I am pleading not guilty and am claiming my innocence of the offense charged.

The offense charges me with tampering with official records, by withholding them, to-wit: a tax receipt, with the intent to harm the State of Texas and the County of Webb.

The State has indicated that it intends to introduce hundreds of tax receipts into evidence to show system, design and intent. Apparently, these tax receipts were supposed to have been turned over to the Comptroller of the State of Texas. The State has indicated that these receipts

represent approximately $250,000.00 which is missing from either the State or County coffers or both. The testimony of the witnesses which the Defendant subpoenaed will establish that monetary shortages have been occuring in the Webb County Tax Assessor-Collector's Office for at least 10 years.

There are two State Agencies actively involved in this case: the State Comptroller's Office and the Texas Highway Department. The tax receipts and many of the other forms listed in the subpoena duces tecum, together with the money for these, would be sent to these two State Agencies. Other forms would inform the agencies of which documents were not being sent.

Prior to the trial, the District Attorney would not inform me which State agency had possession and control of each document.

Bob Bullock is the Comptroller

of the State of Texas. He is the person most familiar with the over-all operations of the Comptroller's Office. I need his testimony to establish my innocence.

Mr. Tom Gay is an auditor for the Comptroller's Office. Last April he made an appointment in Fort Worth with my attorneys to discuss this case. The day after the appointment was made, Mr. Gay cancelled it because Mr. Charles Borchers, the Webb County District Attorney, told him not to speak with my attorneys unless Mr. Borchers was present. Mr. Borchers has been extremely obstinate throughout these proceedings and has not allowed me access to any of the original documents listed in the subpoena duces tecum. One of Mr. Borchers' reasons for this conduct is that he doesn't control the Comptroller's Office.

My attorneys wrote to Mr. Gay and requested to see documents pertaining

to this case and confirmed the cancellation of the appointment. Mr. Gay sent the letter to Mr. Robert Storey, another of Mr. Bullock's subordinates. Neither Mr. Gay nor Mr. Storey ever responded to my attorney's requests.

Bob Bullock is the State Comptroller He is the person most familiar with the over-all operations of the Comptroller's Office. He is charged with knowledge of what is happening in all of his departments. I do not want to have to subpoena all of the employees of the Comptroller's Office. I want the testimony of Mr. Bob Bullock for my defense.

Mr. Bullocks testimony is needed for the following reasons: to establish who is responsible for each separate department of the Comptroller's Office and to learn the duties of these persons; to show that someone other than myself is guilty of the offense charged; that the Comptroller had knowledge that the tax

receipt was in the Webb County Tax Assessor Collector's Office; that the Comptroller had access to it anytime he wanted it; that it was not my responsibility to send the receipt to the Comptroller, it was the responsibility of the Tax Assessor-Collector; that the Comptroller has known about the missing monies for numerous years; that the State has not sued the Tax Assessor-Collector for the money; that efforts have been made to protect the Tax Assessor-Collector and to cover up for his misdeeds; to identify correspondence between the Comptroller and the Tax Assessor-Collector and the Comptroller and the Governor and other correspondence; to testify that no other correspondence exists other than what has been brought to court; to identify documents sent to the Comptroller's Office by the Tax Assessor-Collector's Office; to show that the Tax Assessor-Collector was lying when he testified last February that

he had learned about the missing monies in January; that actually he knew about them for years; that the Comptroller has conducted yearly audits since 1969; that he has received monthly reports for paid and missing receipts for at least 10 years.

Ron Hamilton is the Regional Supervisor of the Motor Vehicle Section of the Texas Highway Department. He was the main investigator for the Highway Department in this case. As such, he is familiar with the over-all scope of the investigation, having spoken to the Tax Assessor-Collector and other employees in the Tax Office. He is listed as a witness in 3 of the 12 indictments brought against me.

Mr. Hamilton also refused to speak to my attorneys. He told them that it would be inappropriate to speak to them prior to trial. Now, it appears that Mr. Hamilton doesn't even want to talk about

the case at the trial.

I need Mr. Hamilton's testimony to show the following: the interrelationship between the Highway Department and the Comptroller's Office; to identify the various documents that were sent to the Texas Highway Department by the Tax Assessor-Collector's Office; to establish that a copy of the Arthur Ochoa tax receipt was sent to the Highway Department; to show that the Highway Department had knowledge that the receipt was in the Webb County Tax Assessor-Collector's Office, that the Highway Department had access to it; to show that someone other than myself is guilty of the offense; that Mr. Hamilton was one of the main participants in this case; that the Highway Department knew about the missing monies for numerous years; that efforts have been made to protect the Tax Assessor-Collector and to cover up for his misdeeds; to show that the Tax Assessor Collector was lying last February that he had learned about missing monies

in January; that he actually knew about them for years; to establish the contents of conversations between the Tax Assessor-Collector and Ron Hamilton which have taken place for a long period of time especially in the Tax Assessor-Collector's Office and in my presence.

I base the above expected testimony of Bob Bullock and Ron Hamilton on the following: my personal knowledge of the workings of the Webb County Tax Assessor-Collector's Office for the last fifteen years; my conversations with the Tax Assessor-Collector and his chief deputy; my overhearing of conversations between representatives of the Comptroller's Office and the County Tax Assessor-Coltor; my conversations with Ron Hamilton my overhearing of conversations between Ron Hamilton and Francisco Flores, the Tax Assessor-Collector; my conversations with fellow employees in the Tax Assessor Collector's Office; the investigation which my attorneys have conducted which involves

speaking to employees in the Webb County Tax Assessor-Collector's Office and others. These substantiate the above expected testimony as will all of the documents which have been subpoenaed.

I believe that the Attorney General's Office has actively assisted Charles R. Borchers, the District Attorney, in protecting the Tax Assessor-Collector. At the examining trial, one of the Tax Assessor-Collector's three attorneys, Carlos M. Zaffirini, was actively assisting the State in the presentation of the case. Mr. Borchers objected to the defense calling Mr. Flores as a witness and objected to any questioning of Mr. Flores.

The evidence as outlined in Defendant's affidavits in support of pre-trial motions indicated that the District Attorney pursuaded the grand jury to withdraw votes of indictment against Francisco Flores, the Tax Assessor-Collector. It is my belief that the evidence

in this case will establish that the State has sought to protect and assist Mr. Flores and others who are possibly guilty of this offense. Mr. Hill's testimony will show that Flores is legally responsible for the missing monies. His testimony will establish that Mr. Flores' bond covers only $50,000.00 of the $250,000.00 which is apparently missing. He will also establish that the bonding company is Western Surety Company. Yet Mr. Hill as the State Attorney General, has made no effort to sue Flores or the bonding company for the return of these missing monies. I want Mr. Hill to explain to the jury why these favors are being meted out to a prime suspect and a main witness against me.

The above testimony of Bob Bullock, John Hill and Ron Hamilton would be material in the following respects: it would show that someone else committed the offense rather than me; it would be relevant to the issue of an intent

to harm the State; it would affect the motive and the credibility of the Tax Assessor-Collector and his chief deputy; it would show that I did not commit the offense.

I need these witnesses and I do not want someone else to choose my witnesses for me. I want these men because their credibility is sound. I do not wish to rely on the testimony of people with whose credibility I am not familiar.

Mr. Bullock's attorney has indicated to my attorney that Mr. Bullock is an extremely busy man. I beg Mr. Bullock Mr. Hill and Mr. Hamilton to spare a couple of hours of their busy schedule to assist me in establishing my innocence of this charge."

/s/Irene Perez
Irene Perez

Sworn to and subscribed before me by the said Irene Perez this 21 day of July, 1977.

/s/ Rosa S. J. Mata
Notary Public in and for Webb County, Texas.

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NO.16861,16862,16863,16864,16865
16866,16867,16868,16869,1670,
16871,16872

THE STATE OF TEXAS ()IN THE DISTRICT COURT
VS ()49TH JUDICIAL DISTRICT
IRENE PEREZ ()WEBB COUNTY,TEXAS

MOTION FOR DISCOVERY OF DOCUMENTARY EVIDENCE

TO THE HONORABLE THE SAID COURT:

Defendant moves the Court for an order requiring the State to produce for inspection and copying the following documentary items:

1. All motor vehicle sales tax receipts upon which the State relied in presenting this case to the grand jury which have not already been turned over to the Defendant.

2. All vehicle registration receipts upon which the State relied in presenting the case to the grand jury which have not already been turned over to the Defendant.

3. All penalty receipts upon which the State relied in presenting this case to the grand jury which have

not already been turned over to the Defendant.

4. All Mexican receipts or twenty-four hour permits upon which the State relied in presenting this case to the grand jury which have not already been turned over to the Defendant.

5. All seventy-two hour permits upon which the State relied in presenting this case to the grand jury which have not already been turned over to the Defendant.

6. All "One Trip Tickets" upon which the State relied in presenting this case to the grand jury which have not already been turned over to the Defendant.

7. All applications for title upon which the State relied in presenting this case to the grand jury which have not already been turned over to the Defendant.

8. All transfer receipts upon which the State relied in presenting this case to the grand jury which have not been turned over to the Defendant.

9. All motor vehicle tax receipts which the State intends to introduce into evidence at the trial in chief.

10. All vehicle registration receipts which the State intends to introduce into evidence at the trial in chief.

11. All penalty receipts which the State intends to introduce into evidence at the trial in chief.

12. All Mexican receipts or twenty-four hour permits which the State intends to introduce into evidence at the trial in chief.

13. All seventy-two hour permits which the State intends to introduce into evidence at the trial in chief.

14. All "One Trip Tickets" which the State intends to introduce into evidence at the trial in chief.

15. All applications for title which the State intends to introduce into evidence at the trial in chief.

16. All transfer receipts which the State intends to introduce into evidence

at the trial in chief.

17. All motor vehicle sales tax receipts apparently issued by Defendant.

18. All vehicle registration receipts apparently issued by Defendant.

19. All penalty receipts apparently issued by the Defendant.

20. All Mexican receipts or twenty-four hour permits apparently issued by Defendant.

21. All seventy-two hour permits apparently issued by the Defendant.

22. All "One Trip Tickets" apparently issued by the Defendant.

23. All applications for title apparently issued by the Defendant.

24. All transfer receipts apparently issued by the Defendant.

25. All motor vehicle sales tax receipts which were apparently issued by persons other than the Defendant including but not limited to: Lucio Prado, Arturo Villarreal, and Francisco J. Flores.

26. All vehicle registration receipts which were apparently issued by persons other than the Defendant including but not limited to:Lucio Prado,Arturo Villarreal and Francisco J. Flores.

27. All penalty receipts which were apparently issued by persons other than the Defendant including but not limited to:Lucio Prado,Arturo Villarreal,and Francisco J. Flores.

28. All Mexican receipts or twenty-four hour permits which apparently were issued by persons other than the Defendant including but not limited to:Lucio Prado, Arturo Villarreal,and Francisco J.Flores.

29. All seventy-two hour permits which were apparently issued by persons other than the Defendant including but not limited to;Lucio Prado,Arturo Villarreal, and Francisco J. Flores.

30. All "One Trip Tickets" which were apparently issued by persons other than the Defendant including but not limited to:Lucio Prado,Arturo Villarreal and

Francisco J. Flores.

31. All applications for title which were apparently issued by persons other than the Defendant including but not limited to:Lucio Prado, Arturo Villarreal, and Francisco J. Flores.

32. All transfer receipts which were apparently issued by persons other than the Defendant including but not limited to:Lucio Prado, Arturo Villarreal, and Francisco J. Flores.

33. All checks written by the following persons for the taxes paid:

1.	Bill McKendrick,III	5.	John M. Bruce
2.	Ramiro Reyes	6.	Cecilia M.Claflin
3.	Rodolfo Tenorio,Jr.	7.	Jose C. Garcia
4.	Arthur E.Ochoa	8.	Cesar R.Walker

These are the persons named in the documents contained in the indictments.

34. All audits of the Webb County Tax Assessor's Office which were conducted by the Comptroller's Office and any other auditor.

35. Any other documentary evidence material to this case or pertinent to the defense of the accused.

36. The search warrant, if any, used to acquire bank records of the Defendant.

37. All bank records which were subpoenaed by the State.

For grounds Defendant states:

1. These items are in the custody, possession and control,of the District Attorney, the Comptroller's Office and other State agencies.

2. Defendant needs the above items to properly prepare her defense.

3. Defendant has been suspended from her employment at the Tax Assessor's Office by Francisco J. Flores and therefore does not have immediate and direct access to the Tax Office Records.

4. The Defendant is unable to get these items from any other source (except the bank records).

5. All of these items are material and necessary to the defense of the Defendant. She needs the documents to determine whether it is actually her handwriting

that appears on the documents rather than some other employee. Further,she needs the documents to show that persons other than herself committed the offenses for which Defendant has been indicted and other related offenses.

6. The number of tax receipts which have been issued in the past seven years is voluminous. The shortages of money in the Tax Assessor's Office date back at least six or seven years. Defendant is unable to recall which tax receipts she personally issued without examining all of the receipts.

7. Defendant denies that she committed the offenses and needs the above documents to show that she did not commit the offenses.

8. Further, the documents are needed to show that other persons had access to all the records, and monies coming into the Tax Assessor's Office.

9. The checks are needed to show that the monies were deposited in the

County and State accounts rather than being secreted.

Respectfully submitted,

J. G. Hornberger
J. G.Hornberger, Jr.
915 Victoria Street
Laredo, Texas 78040
Attorneys for Defendant

by /s/J. G. Hornberger, Jr.
J. G. Hornberger, Jr.
FILED APRIL 4, 1977.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Discovery of Documentary Evidence has this 4th day of April,1977 been mailed/delivered to Mr. Charles R. Borchers, Webb County Courthouse, Laredo, Texas, attorney for the State of Texas.

/s/J.G.Hornberger,Jr.
J. G. Hornberger, Jr.

THE STATE OF TEXAS ()

COUNTY OF WEBB ()

Before me, the undersigned authority, on this day personally appeared Irene Perez, known to me to be the person whose signature is hereinafter affixed, who after being duly sworn,on her oath stated:

"My name is Irene Perez,and I am the Defendant in the above entitled and numbered cause. I have read the above and foregoing Motion for Discovery of Documentary Evidence and the matters of fact set forth herein are true and correct."

/s/Irene Perez
Irene Perez

Sworn to and subscribed before me by the said Irene Perez this 4 day of April, 1977, to certify which witness my hand and seal office.

/s/Rosa S.J.Mata
Notary Public,Webb County,
Texas.

NO.16861,16862,16863,16864,16865,16866,
16,867,16868,16869,16870,16871,16872

THE STATE OF TEXAS IN THE DISTRICT COURT
VS 49TH JUDICIAL DISTRICT
IRENE PEREZ WEBB COUNTY,TEXAS

MOTION FOR DISCOVERY OF EXCULPATORY EVIDENCE MATERIAL TO THE DEFENSE OF THE ACCUSED

TO THE HONORABLE THE SAID COURT:

Defendant moves for an order requiring the State to produce the following exculpatory evidence and matters material to the defense of the accused.

I

All evidence derived in the investigation by Ramiro Martinez (Texas Ranger), Tom Gay (Comptroller's Office),Ron Hamilton(Highway Department), Charles R.Borchers, and any other investigator, auditor, or prosecutor which showed or indicated that Defendant did not commit the offenses with which she is charged or other related offenses, or that someone else committed the offenses or related offenses.

Specifically:

A. Statements by the following

persons who are employees of the Webb County Tax Assessor's Office (these employees hereinafter referred to as "A") that they had no knowledge that the Defendant committed an offense.

Francisco J.Flores	Francisca Gonzalez
Arturo Villarreal	Maria Garcia
Lucio Prado	Leo Lopez
Graciela Cruz	Marie Gutierrez
Herlinda Rodriguez	Antonio Oliveira
Elma Salinaa	J.C.Perez
Jose Ceja	Larry Hernandez
Berta Garza	

B. Statement by "A" or others that Defendant did not commit the offenses with which she was indicted.

C. Statements by "A" or others, including Gay and Hamilton which indicated that persons other than Defendant committed the offenses.

D. Statements by "A" or others, including Gay and Hamilton which indicated that persons other than Defendant could have or did commit the offenses or related offenses.

E. Allwritten checks for taxes paid on receipts issued by Irene Perez

and which were eventually deposited in the Webb County or State accounts.

F. All evidence, oral and written that Irene Perez did not secrete any monies including but not limited to the following:

1. All statements and documents from taxpayers which were issued tax receipts by Irene Perez and whose money ended up in the County or State accounts.

2. The sum total of monies that were received for tax receipts issued by Irene Perez and which eventually ended up in the County or State accounts.

G. All evidence, oral or written, showing that other persons in the Webb County Tax Assessor's Office secreted monies including but not limited to the following:

1. All statements and documents from taxpayers which were issued tax receipts by Lucio Prado, Arturo

Villarreal and Francisco J. Flores and whose money did not end up in the County or state Accounts.

2. All monies for tax receipts issued by Lucio Prado, Arturo Villarreal and Francisco J. Flores which cannot be shown to have ended up in the Webb County or State accounts.

H. All evidence showing extraordinary expenditures by Arturo Villarreal and Francisco J.Flores including but not limited to the following:

1. Bank account records of Arturo Villarreal and Francisco J. Flores.

2. Trips taken by Arturo Villarreal and Francisco J. Flores in the past seven years.

3. Properties bought by Arturo Villarreal and Francisco J.Flores in the past seven years.

II

All testimony before the Grand Jury which showed or indicated that Defendant

did not commit the offense with which she is charged, or other related offenses, or that someone else committed the offenses or related offenses.

Specifically:

A. Testimony by Gay, Hamilton, Arturo Villarreal, or others that they had no knowledge that Defendant committed the offenses.

B. Testimony by Gay, Hamilton, Villarreal and others that indicate that persons other than Defendant committed the offenses.

C. Testimony by Gay, Hamilton, Villarreal and others which indicated that persons other than Defendant could have or did commit the offenses or related offenses.

D. Alternatively, that the District Attorney furnish a gist of the testimony of the above individuals on the above matters.

E. The above matters would tend

to exculpate the Defendant and also mitigate punishment if she is eventually found guilty.

III

That the following matters pertaining to the Grand Jury be disclosed to the Defendant.

1. Whether or not the Grand Jury voted to indict Arturo Villarreal and Francisco J. Flores.

2. If so, whether or not the Grand Jury foreman made a memorandum of such matter and presented it to the attorney representing the State.

3. If so, whether the attorney representing the State prepared an indictment with as little delay as possible.

4. Whether the District Attorney his agents,or assistants,encouraged,induced or aided the Grand Jury or any member thereof not to vote for an indictment against Arturo Villarreal or Francisco J. Flores.

5. Whether the District Attorney

his agents, or assistants,encouraged, induced, or aided the Grand Jury to withdraw a vote of indictment against Arturo Villarreal and Francisco J.Flores.

6. Whether the District Attorney encouraged, induced, or aided the preparation of the resolution passed by the Grand Jury.

7. Whether the District Attorney, his agents, or assistants was present before the Grand Jury when the Grand Jury was deliberating on an accusation against Arturo Villarreal.

8. Whether the District Attorney his agents, or assistants, was present before the Grand Jury when the Grand Jury was deliberating on an accusation against Francisco J. Flores.

9. Whether the District Attorney his agents, or assistants, were present before the Grand Jury when the Grand Jury was deliberating on an accusation against Irene Perez.

10. Whether the District Attorney, was present at any time before the Grand Jury when the Grand Jury was discussing the propriety of returning an indictment against Arturo Villarreal.

11. Whether the District Attorney was present at any time before the Grand Jury when the Grand Jury was discussing the propriety of returning an indictment against Francisco J. Flores.

12. Whether the District Attorney was present at any time before the Grand Jury when the Grand Jury was discussing the propriety of returning an indictment against Irene Perez.

13. Whether the District Attorney, his agents, or assistants actually deliberated and discussed with the Grand Jury the propriety of returning an indictment against Arturo Villarreal, Francisco J. Flores or Irene Perez.

14. To state whether any recordings were made of any proceedings before the

Grand Jury.

15. To state whether any person other than the following was ever present during Grand Jury sessions either in the Grand Jury Room or the Webb County Probation Office which adjoins the Grand Jury Room: The District Attorney, Assistant District Attorneys, witnesses who testified before the Grand Jury, the grand jurors.

If so, state the reason why such person was so present.

16. To state whether any person other than the following was ever present in the Grand Jury room or the Webb County Probation Office when a witness was testifying: The District Attorney, Assistant District Attorneys, the grand jurors, the testifying witness.

17. To state the names of all persons who were in the Court Reporter's Room which is next to the Grand Jury room for any period of time in excess of ten minutes while the Grand Jury was in session.

To state the reasons why such person were present.

It should be pointed out that a person sitting in the Court Reporter's Room can hear the Grand Jury proceedings.

18. To list all persons who were ever on the balcony surrounding the third floor of the courthouse at any time the Grand Jury was in session.

19. To state whether or not the District Attorney was with the Grand Jury the morning of March 29, 1977.

If so, state now how long and for what reason.

If so, state whether the District Attorney used the front entrance (the door near the judge's office) or a back entrance. If a back entrance, state the nature of such back entrance and the reason for using such back entrance.

20. To list all persons other than the following, if any, with whom the District Attorney, his agents, or assistants discussed matters which were brought

before the Grand Jury: the District Attorney, his agents, his assistants, witnesses who testified before the Grand Jury, and the grand jurors.

Specifically, Defendant requests whether such matters were discussed with Arturo Villarreal,Francisco J.Flores, Carlos Zaffirini,any other private attorneys, or any other person.

21. Defendant requests a hearing on the above matters at which she intends to call the witnesses including but not limited to the District Attorney,his assistants and the Grand Jury bailiffs.

The above is based on the Fifth, Sixth,and Fourteenth Amendments to the United States Constitution (due process of law and effective assistance of counsel)and Article I, Section 10 of the Texas Constitution, and the following provisions of the C.C.P.:19.36, 19.37, 19.38, 19.39, Article 20.02, 20.03, 20.20, 20.21, 20.22 and to enable the Defendant to submit to the Court a motion to set aside the indict-

ment, if any, of the above matters did occur. Further that such matters would tend to exculpate the Defendant and would also tend to mitigate punishment if she were eventually found guilty.

Respectfully submitted,
J. G. Hornberger
J. G. Hornberger,Jr.
915 Victoria Street
Laredo, Texas 78040
Attorneys for Defendant

by/s/J. G. Hornberger, Jr.
J. G.Hornberger, Jr.

Certificate of Service

I hereby certify that a copy of the above and foregoing Motion for Discovery of Exculpatory Evidence Material to the Defense of the Accused has this day been mailed/ delivered to Mr. Charles R. Borchers,Webb County Courthouse,Laredo, Texas,attorney for the State of Texas.

Dated: April 4th, 1977.

/s/J. G. Hornberger,Jr.
J. G. Hornberger,Jr.

FILED APRIL 4, 1977.

NO. 8916

IN THE COURT OF CRIMINAL APPEALS OF THE

STATE OF TEXAS

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IRENE PEREZ, RELATOR

VS

RUBEN GARCIA, JUDGE OF THE 49TH JUDICIAL

DISTRICT COURT OF WEBB COUNTY, TEXAS

****

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

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TO THE HONORABLE JUDGES OF SAID COURT:

Irene Perez, relator, complaining of Ruben Garcia, Judge of the 49th Judicial District Court of Webb County, Texas, Respondent, moves this Honorable Court to grant Relator leave to file its petition for writ of mandamus, herewith tendered, said petition being hereby referred to and made a part of this motion for all purposes.

Relator prays that said petition for Writ of Mandamus be filed and set down for hearing, and for other relief, general

and special, to which she may be entitled.

Respectfully submitted,

J. G. Hornberger
J. G. Hornberger, Jr.
915 Victoria Street
Laredo, Texas 78040
Attorneys for Relator

by /s/ J. G. Hornberger,Jr.
J. G.Hornberger, Jr.

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Leave to file Petition for Writ of Mandamus has this 19 day of February, 1980, been delivered to Ruben Garcia, Judge of the 49th District Court of Webb County, Texas, Webb County Courthouse, Laredo, Texas and Charles R. Borchers, Farragut and Flores, Laredo, Texas.

/s/ J. G. Hornberger,Jr.
J. G. Hornberger,Jr.

(NUMBER AND TITLE OMITTED)

PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE THE SAID COURT:

Irene Perez, Relator, complaining of Ruben Garcia, Judge of the 49th District Court of Webb County, Texas, Respondent, respectfully shows as follows:

I

Relator seeks to compel Respondent to obey the terms of the mandate of the Court of Criminal Appeals of the State of Texas. On September 20, 1977, the trial court entered its original probated judgment in this case. On October 12, 1977, the trial court granted in part Relator's Motion in Arrest of judgment and modified the original judgment insofar as it pertained to restitution. Attached hereto as Exhibit "A" is the indictment under which Relator was convicted. Attached hereto as Exhibits "B" and "C" are the trial court's judgment and order. Relator

appealed from the judgment and this Honorable Court sustained the conviction. Attached hereto as Exhibit "D" is the mandate of this Honorable Court.

II

On January 11, 1980, the trial court had a hearing to enforce the judgment of the trial court pursuant to the mandate of the Court of Criminal Appeals. Without any notice to Relator, the trial court proceeded to change the judgment from which Relator had appealed. The trial court delegated to the District Attorney the authority to determine an amount of restitution to be paid by Relator. Then, in an obvious attempt to punish Relator for having exercised her right of appeal, the trial court entered an order requiring Relator to make restitution in the amount of $176,521.55 to the State of Texas and $9,290.61 to the County of Webb. Attached hereto as Exhibit "E" is a copy of an order entered on January 24, 1980, which

increased Relator's punishment insofar as it pertained to the probationary conditions.

III

The trial court was without jurisdiction to do the following:

A. Punish Relator for exercising her right of appeal by increasing the punishment insofar as it pertained to restitution in violation of the due process clause of the Fifth Amendment and Fourteenth Amendment to the United States Constitution.

B. Change the terms of the original judgment after the original judgment had been affirmed on appeal.

C. Delegate the amount of restitution to the District Attorney without hearing any evidence thereon.

D. Requiring restitution in the amount of $176,521.55 to The State of Texas and $9,290.61 to the County of Webb when Relator was convicted of tampering with a tax receipt which represented a tax in the amount of $160.40.

WHEREFORE, Relator asks this Honorable Court to set this matter for hearing at the earliest possible time and that upon hearing, it order said Ruben Garcia, Judge of the 49th District Court of Webb County, Texas, to vacate his order dated January 24, 1980, to comply with the mandate of this Honorable Court, and that he enforce the terms of the original judgment of conviction from which Relator exercised her right of appeal.

Respectfully submitted,

J. G. Hornberger
J. G. Hornberger, Jr.
915 Victoria Street
Laredo, Texas 78040
Attorneys for Relator

by /s/ J. G. Hornberger, Jr.
J. G. Hornberger, Jr.

CERTIFICATE OF SERVICE

A copy of the above and foregoing Petition for Writ of Mandamus has this 19 day of February, 1980, been delivered to the Honorable Ruben Garcia, Judge of the 49th District Court of Webb County, Texas,

Webb County Courthouse, Laredo, Texas and Charles R. Borchers, Farragut and Flores, Laredo, Texas.

/s/ J. G. Hornberger, Jr.
J. G. Hornberger, Jr.

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(EXHIBIT A-copy of indictment omitted)

(EXIBIT B-title and number omitted)

PROBATED JUDGMENT

On this, the 25th day of July, A.D. 1977, the above numbered and entitled cause was regularly reached and called for trial, when came the State of Texas by her District Attorney and the Defendant, Irene Perez, appeared in person and by her attorney, and both parties announced ready for trial, and the defendant in open Court pleaded not guilty to the charge contained in the Indictment; thereupon a jury, to-wit: M.T. Longoria, and eleven others, was duly selected, impaneled and sworn to try said issue, and thereafter, on the 28th day of

July, A.D. 1977, said jury who, having heard the Indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, and having heard the argument of counsel, retired in charge of the proper officer to consider their verdict, and afterwards were brought into open Court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit:

"We, the jury, find the defendant guilty as charged in the indictment."

/s/M.T.Longoria
Foreman of the Jury

Thereupon the defendant elected to have her punishment assessed by the jury and such jury was called back into the box and heard evidence relative to the question of punishment and thereafter they

retired to consider such question and after having duly deliberated, they returned into Court the following verdict, to-wit: "We, the jury having found the defendant guilty as charged in the indictment, and the defendant having elected to have the same jury assess punishment, we, the jury, now assess her punishment at confinement in the Texas Department of Corrections for a term of 5 years, and in condition to such confinement, assess a fine of $5,000 and we do further find from the evidence that the defendant has never before been convicted of a felony in this or any other State, and we do recommend that the imposition of her sentence be suspended and that she be placed on probation under the further orders of this Court, as to the prison term only.

/s/ M.T.Longoria
Foreman of the Jury

IT IS THEREFORE, ORDERED, ADJUDGED, and DECREED by the Court that the Defendant,

Irene Perez, is guilty of the offense of Tampering with Governmental Record, Count II, Felony 3, as found by the jury, and that her punishment has been set by confinement in the Texas Department of Corrections for a term of 5 years, and that the State of Texas do have and recover of and from said defendant all costs in this proceeding incurred, for which let execution issue.

However, on the finding by the jury that the defendant, Irene Perez, is eligible for probation and on the recommendation of the jury that the imposition of the sentence be suspended and that the Defendant be placed on probation.

IT IS THEREFORE, FURTHER ORDERED, by the Court that the imposition of the sentence in this cause be, and the same is hereby suspended during the good behavior of the defendant and the defendant be and is hereby placed on probation for a term of five (5) years, beginning on this

date, July 28, 1977, under the supervision of the Court and the duly appointed and acting Adult Probation Officer of the 49th Judicial District Court of Webb County, Texas, or his successors in office, subject to the following conditions of probation, viz: that during the term of the probation the defendant shall:

1. Neither commit nor be convicted of any offense against the laws of the State of Texas, any other State or of the United States.

2. Avoid injurious or vicious habits and abstain from the use of narcotic drugs in any form and the use of alcoholic beverages to excess;

3. Avoid places and persons of harmful or disreputable character, including places where narcotic drugs are possessed, sold or used and not associate with persons who possess, sell or use narcotic drugs, and not associate with persons of criminal record;

4. Obtain and keep gainful employment in a lawful occupation;

5. Report to the 49th District Court of Webb County, Texas, on the 10th of each month;

6. Permit the Adult Probation Officer, or his assistants, to visit her at her home or elsewhere;

7. Remain within Webb County, Texas unless permitted to depart by the Court and/or by the Adult Probation Officer;

8. Not leave the State of Texas, without the consent of this Court;

9. Support her dependents that she now has or that she may acquire during the term of this probation;

10. Report any change of address, change of job, or arrest to the Adult Probation Officer within forty-eight hours;

11. Pay $5,000.00 dollars Fine plus $54.00 dollars Court Costs within the next twenty-four hours from this day, July 28, 1977;

12. Pay $10.00 dollars monthly probationary fee;

13. Restitution in the dollar amount missing Forms 31, Tax Receipts, turned in by defendant, Irene Perez, as reflected by the evidence in this case.

SIGNED AND ENTERED this 20th day of September, 1977.

/s/ E. James Kazen
E. James Kazen
Judge of the 49th Judicial
District Court of Webb County,
Texas.

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EXHIBIT B-ORDER

(TITLE AND NUMBER OMITTED)

On this 12th day of October, A.D. 1977, came on to be heard the Motion in Arrest of Judgment filed by defendant, Irene Perez. Defendant appeared through her attorney and the State appeared through her District Attorney. After hearing evidence and arguments of counsel on both sides, the Court is of the opinion that the Motion in Arrest of Judgment should be

granted to the extent that the conditon of probation numbered thirteen (13) in the judgment of conviction this Court signed September 20th, 1977, which reads as follows: "13. Restitution in the dollar amount of missing Forms 31, Tax Receipts, turned in by the defendant, Irene Perez, as reflected by the evidence in this case" should be deleted and that the following condition should be substituted in its place: "13. No restitution is to be made pending the outcome of civil action no. 30,429 in the 111th District court of Webb County, Texas, dealing with the same subject matter." In all other respects defendant's Motion in Arrest of Judgment should be denied.

IT IS THEREFORE ORDERED and DECREED by this Court that the condition of probation numbered thirteen (13) in the judgment of conviction of this Court dated September 20, 1977, be, and it is hereby deleted, and the following condition is hereby substituted in its place: "13. No Restitution

is to be made pending the outcome of civil action no. 30,429 in the 111th District Court of Webb County, Texas, dealing with the same subject matter."

IT IS FURTHER ORDERED and DECREED that all other relief sought by Defendant in her Motion in Arrest of judgment, not specifically granted herein, is hereby denied.

SIGNED and ENTERED this 12th day of October, A.D., 1977.

/s/ E. James Kazen
E. James Kazen
Judge of the 49th District Court of Webb County, Texas.

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(EXHIBIT C--OPINION of the Court of Criminal Appeals-OMITTED)

EXHIBIT D- ORDER

(Number and Titie Omitted)

On this 11th day of January, 1980, in the above styled and numbered cause, came on to be heard the matter of enforcing the verdict and judgment of this court after receiving the Mandate from the Court of Criminal Appeals. The State appeared by her District Attorney and the Defendant, Irene Perez, appeared in person with her attorney, J. G.Hornberger, Jr., The State urged the Court to make restitution a condition of probation based on the evidence in the case. The Court, after hearing arguments on both sides, and based on the evidence in this case, (being the total amount of recovered Form 31 receipts bearing the defendant's initials) finds that one of Defendant's conditons of probation should be that she make restitution to the State of Texas in the amount of $176,521.55 and to the County of Webb in the amount of $9,290.61;

accordingly;

It is thereby Ordered that Defendant Irene Perez, make restitution to the State of Texas in the amount of $176,521.55 and to the County of Webb in the amount of $9,290.61 and that this restitution be made a condition of her probation.

Defendant in open Court excepted to the Court's ruling and gave notice of appeal.

SIGNED AND ENTERED on this 24th day of January, 1980.

/s/ Ruben Garcia

Ruben Garcia, Judge of the
49th District Court of Webb County,
Texas.